**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of Amendment of the Over-The-Air Reception Devices Rule to Clarify the Extent to which Local Governments Can Regulate Non-Exclusive Use Areas | **FCC Docket No.** MB-12-121 |
| By W. Lee McVey, P.E. | |
| To: The Commission | |

## REPLY TO THE COMMENTS OF THE CITY OF PHILADELPHIA

The following is my Reply to the Comments of the City of Philadelphia (City) in the above captioned proceeding.

1. The City roots its right to regulate antenna placements in common areas upon "police powers" found in its municipal building codes.[1] However, such powers to invade private property were affected, in principle, to protect the public health and safety; *not to determine what is or isn't permitted for solely aesthetic interests.* Similar, in purpose and principle, to

[1] City Comments, p. 2.

the right of each of the fifty states to regulate the practice of professional engineering and architecture involving building design.[2]

2. Unless the City of Philadelphia has the means and expertise to have authored its own building electrical code, it most likely incorporates, by reference, the latest edition of the National Electric Code (NEC); thus making it the city's building electrical code. A practice almost universally followed throughout the United States.[3] The NEC is authored by members of the National Fire Protection Association and its purpose is to practically safeguard people and property from hazards arising from the use of electricity and electrical systems (*emphasis added)*.[4] It is silent on aesthetic concerns.

3. The NEC incorporates and regulates the design of all types receiving antennas, supporting structures and interconnecting systems.[5] It does so, consistent with its purpose, which is to protect the public from electrical hazards possibly caused by antenna placement and operation. The constraints included in the NEC consist of construction details,[6] required clearance distance (set-backs) from overhead electric circuits[7] and grounding and lightning protection requirements.[8] The entire NEC Article 810, **Radio and Television Equipment**, *does not prohibit the installation of antennas on residential,*

[2] The professional practice of civil, electrical or mechanical engineering and architecture requires registration or licensure by each state, where practice takes place, in order to help ensure public health and safety.
[3] Usually, the most current version, but sometimes a prior edition. Other subject matter codes incorporated by reference into local government building codes are the International Building Code, the Fire Code, and the International Plumbing and Mechanical Code.
[4] See NEC Art. 90.1(A), Purpose of the National Electric Code.
[5] *Id*., Art. 810.1 Includes, but is not limited to, multi-element, vertical rod, wire and dish antennas and their supporting and interconnecting systems.
[6] *Id*., Art. 810.11-810.15
[7] *Id*., Art. 810.18(A)-(C)
[8] *Id*., Art. 810.20-810.21.

*commercial or industrial building structures; nor does it limit antenna placement on private property for aesthetic reasons.*

4. Exclusive-use, common areas in multi-family dwellings are typically front entrance alcoves or, if they exist, patios or balconies. Often, due to orientation of exclusive-use areas relative to satellite position, landscaping, and the placement of trees near structures; only roof areas or limited, common use surface areas on fronts or sides of structures are suitable for satellite or broadcast antenna placement to obtain a satisfactory signal. And, for practical reasons in routing interconnecting coaxial cables. For instance, for Direct TV satellite reception, a clear path to the southwestern sky is needed from my place of residence near Birmingham, Alabama. Was it the intent of Congress that only persons in multi-family apartments and condominiums with southwest-facing exclusive common-use areas be allowed receipt of a satisfactory satellite signal? Certainly not where those in ownership or control of common use areas have granted permission to subscribers to use them for antenna placement. The City states that it only prohibits placement of antennas in the front of buildings if another suitable location permitted by its building code is available.[9] Or, the subscriber must obtain a written contractual conversion of the desired placement location into exclusive-use common area.[10] So, a heavy burden is placed on subscribers desiring reception, not the City, to attempt to find other City-permitted, non-exclusive common use locations, perform signal strength surveys, and obtain permission from homeowner associations or landlords to use them for an antenna installation. Together with approval to route and install necessary conduits and signal cables to and from a particular living unit to

[9] City, loc.cit.
[10] *Id.*, Ref. 3.

the antenna. Burdens making the choice of satellite service or over-the-air TV impractical, costly, and most certainly delayed. Or, more likely, an outright impossibility altogether. Especially so if a revised lease or common area conversion agreement is required as a precedent to issuance of a City building permit for a satellite dish antenna installation. It follows that the lease or agreement would be used as a means to either prove to the City that no other owner-permissible, non-exclusive-use common area location exists; or as a means to enable present OTARD Rule subscriber protections; or both.

5. The burden on an affected subscriber in Petitioning the Commission is by no means equitable. As is evidenced by the fact that a subscriber is not petitioning the Commission in this instant example, a national association of satellite service providers is. It is likely far more difficult and costly to challenge local government codes and ordinances when compared to often-replicated, garden-variety land use restrictions of homeowner associations or landlords. Local government has the authority, through its police powers, to threaten criminal arrest and prosecution of subscribers for non-compliance with its codes and ordinances. Homeowner associations and landlords do not. And, although the OTARD Rule suspends some actions and fees imposed on those fortunate enough to be Petitioners and not already serving a sentence following conviction for code violations,[11] it is not consistent with earlier Commission-promulgated earth station satellite antenna regulations. In that instance, the Commission *preempted any and all local zoning and building restrictions except those with a demonstrated health and safety purpose*.[12]

[11] 47**CFR**§1.4000 (a)(4)
[12] 47**CFR**§25.104(b)(1)

6. Perhaps there are other motives at work influencing local governments to favor cable TV and other wire or fiber-optic-based conduits for media reception. Historically, the value of installed utility assets have been taxed as property and, of course, we have the well-known local government franchise fees.[13] Since the assets of satellite companies, beside what is owned by subscribers are not on the ground to be taxed,[14] it is advantageous to local governments for utilities to have large infrastructure investments for tax revenue purposes. And, is clearly demonstrated in substantial telephone company infrastructure investment in recent years to provide TV and other media via fiber optic cable.[15] If the above were not enough, we have the usual and customary local utility taxes based upon the total amount billed for utility service. A few rather obvious examples of why cities might desire cable-based utility media delivery over satellite and over-the-air TV reception.

7. For the above reasons, the Commission should reject the claim made by the City that its aesthetics-based antenna placement restrictions have the same legitimate basis and rightful purpose as do public health and safety aspects of its building code. Its attempts to regulate placement of antennas in this proceeding reach far beyond the recognized, legitimate purpose of its building and zoning codes and should be preempted. The extension of federal taking of private property is not in question here, as permission has been obtained from property owners or those in control of use of common areas in question. If anything, it is all about

[13] The California State Board of Equalization annually assesses installed utility assets on behalf of local governments for ad valorem property tax purposes.
[14] A few satellite earth station up-links are necessary in order to provide local program content to subscribers.
[15] AT&T and Verizon now offer what amounts to cable TV, media and high-speed Internet service to individual residential subscribers in larger metropolitan areas.

local governments taking rights granted by private property ownership.[16] It is an example of excessive, over-reaching regulation by municipalities that wish to further their preference for cable TV service or its telecom carrier equivalent by placing costly, perhaps impossible pre-conditions on subscribers wishing to receive satellite or over-the-air TV service.

Respectfully Submitted this 14th day of June, 2012

W. Lee McVey, P.E.
3 Squires Glenn Lane
Leeds, AL 35094-4564

[16] If the Commission is concerned about practical implementation of the OTARD Rule, it should be concerned with devious tactics employed by local governments to otherwise invade private property to limit antenna installation. Where permission has been granted to use non-exclusive common areas by property owners or homeowner associations, local governments should not be entitled to block such grants for purely aesthetic reasons. After all, adverse aesthetic consequences would have the greatest impact on those who reside in or own the instant structures. Aesthetic impacts deemed acceptable by property owners or homeowner associations come *ipso facto* from grants of common area property use for antenna installation.